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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 858

YACIMIENTOS PETROLIFEROS FISCALES,
Petitioner,

against

PARAGON OIL CO., INC.,

and

REPUBLIC TANKERS, S. A.,
Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Pursuant to Rule 58, par. 2, of the Rules of the Supreme Court of the United States, Petitioner Yacimientos Petroliferos Fiscales, petitions for a rehearing on its petition for a writ of certiorari, heretofore denied.

Jurisdiction

A timely petition for certiorari showing jurisdiction under 28 U. S. C. §§ 1254(1) and 2101(c) was denied by this Court on April 15, 1963; and this petition for rehearing is filed under par. 2 of Rule 58 of the Rules of the Supreme Court of the United States.

Questions For Special Reconsideration

1. Whether the making between Republic and libellant of their March 16, 1957 contract, their operating thereunder, and the transportation by libellant for Republic of one cargo pursuant thereto, constituted a deviation from the December 1956 contract between Republic and Petitioner, and displaced, vitiated, avoided, forfeited, wiped out and disentitled either Republic or libellant from invoking or claiming the benefit of the safe berth clause contained in the December 1956 contract.

2. Whether the making of the March 16, 1957 charter party contract subsequent to and deviating from the December 1956 contract between Petitioner and Republic distinguishes cases such as *Constantine & Pickering SS Co.* v. *West India SS Co.*, 199 Fed. 964; *Cities Service Transp. Co.* v. *Gulf Ref. Co.*, 79 F. 2d 521 and *Park SS Co.* v. *Cities Service Oil Co.*, 188 F. 2d 804, relied on by respondents and the Courts below.

3. Whether Republic, after having made at least two cargo deliveries, with lighterage at Interseccion, and being fully acquainted with the tidal nature of the harbor and berth and that the vessel could not at all times remain afloat fully loaded, could make on March 16, 1957 a safe berth clause charter party and maintain this was in reliance on attributing safe meaning to the safe berth clause of the December 1956 contract.

Grounds for Rehearing

I. In *Calmar SS Corp.* v. *Scott*, 345 U. S. 427, 428, the Court, by FRANKFURTER, J., stated:

> "We granted certiorari, 344 U. S. 853, because wide use, so the Court was advised, of the clauses of this policy makes their construction, a necessary issue here, a matter of more than individual concern."

To an equal or greater degree, we submit, the "wide use" of the WARSHIPOILVOY (Rev.) form of safe berth clause in mercantile and transportation contracts, differing greatly as to parties and terms, "makes their construction, a necessary issue here, a matter of more than individual concern" (345 U. S. 428).

The denial of the petition for certiorari herein must have been influenced by failure of Petitioner's counsel to express this adequately, and resulting failure of this Court to appreciate its importance and the importance of determining whether the making by Republic and libellant of the March 16, 1957 charter contract, their operating thereunder, and the transportation by libellant for Republic of one cargo pursuant to its terms and conditions constituted a deviation from the terms and conditions of the December 1956 contract between Petitioner and Republic.

The Court of Appeals, with reference to the December 1956 Purchase Order No. N. Y. 1971 between Petitioner and Republic stated that:

> "The Affreightment Contract, *like so many commercial agreements*, 'carries its endorsements like boating flapping in all directions' . . . . One of these appendages was a photostatic copy of some clauses from the same form of charter party, Warshipoilvoy (Rev.), used by Paragon and Republic in their Voyage Charter, among them the [safe berth clause]. Thus, so far as here relevant, the Voyage Charter and the Affreightment Contract had *identical* safe berth clauses." (Italics ours)

The very expression "like *so many* commercial agreements"* is indicative of the "wide use" (345 U. S. 428)

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* Compare this Court's statement respecting clauses made by riders which the Court construed in *Calmar SS Corp. v. Scott*, *supra*, 345 U. S. 427, 432, that:

> "Construing such conglomerate provisions requires a skill not unlike that called for in the decipherment of palimpsest texts" (345 U. S. 432).

which in *Calmar SS Corp. v. Scott*, *supra.*, occasioned the grant of certiorari.

It is "a necessary issue here" (345 U. S. 428) whether the one safe berth clause, in and subject to the terms and conditions of and between the parties to the one contract, is or is not properly held "identical" with the other safe berth clause, which is in and subject to the different terms and conditions of and between the different parties to the other contract.

The respondents herein have contended and the lower Courts have held that they are "identical" because both contracts use the text of par. 6 of Part II of the WARSHIPOILVOY (Rev.) form, and that, such one clause being "identical", the case is indistinguishable from decisions such as *Constantine & Pickering SS Co.* v. *West India SS Co.*, 199 Fed. 964; *Cities Service Transp. Co.* v. *Gulf Ref. Co.*, 79 F. 2d 521 and *Park SS Co.* v. *Cities Service Oil Co.*, 188 F. 2d 804 relied on by respondents and the Courts below. This is the basic ground of the claims sued on by the respondents, and the basic premise also of the decision of the Court below.

But this, and the further reasoning of the Court of Appeals based thereon, ignores and conflicts with the uniform principle of contract law and decisions of this and other Courts establishing that any clause may have different meaning in different contracts because it must be construed in each instance in light of the parties, dates, circumstances and other express provisions of each contract in which it is used. It ignores and conflicts also with the principle of deviation, and with decisions of this and other courts establishing that if a party to an earlier contract (e. g. Republic, after becoming a party to the December 1956 contract with Petitioner) thereafter deviates therefrom or makes a subsequent contract with a stranger to the first one (e. g. Republic, by its March 16, 1957 contract with libellant, a stranger to the December 1956 contract of Petitioner) which involves deviation from the first, this deviation can-

not modify the first but, if carried into effect by the deviating contractor, will deprive him of the benefit of all clauses of the first contract in his favor.

"The general rule undoubtedly is that, if the shipowner commits a breach of the contract of affreightment which goes to the essence of the contract, he is not entitled after such breach to invoke the provisions of the contract which are in his favor" (*The Sarnia*, 2 Cir., 278 Fed. 459, 461, cert. denied 258 U. S. 625); "the bill of lading and all its clauses were wiped out, and the ship cannot claim the benefit of any limitations therein contained. *The Sarnia, supra.* . . . the shipowner who has deviated cannot claim the benefits of the terms of the bill of lading. It vitiates and avoids the contract of carriage" (*The St. Johns N F*, 2 Cir., 280 Fed. 553, 556, affd. by this Court, *St. Johns N F Shipping Corp.* v. *S. A. Companhia Geral Commercial Do Rio De Janeiro*, 263 U. S. 119, 124, where the Court said that "She accordingly became liable as for a deviation and cannot escape by reason of the relieving clauses inserted in the bill of lading for its benefit". "The benefit of all of these provisions was forfeited" (*Pacific Coast Co.* v. *Yukon Independent Transport Co.*, 9 Cir., 155 Fed 29, 37). See also the railway cases of *McKahan* v. *American Express Co.*, 209 Mass. 270, cited in *The Sarnia; supra*, as analogous; and *Benoit* v. *Central Vermont Railway*, 116 Vt. 266, 33 A. L. R. 2d 139 and note "Deviation by Carrier in Transportation of Property", 33 A. L. R. 2d 145-234, particularly §§ 22, 25 and 35, pp. 193, 199, 217-218.

Analogous also are cases of suretyship and guaranty holding that if the indemnitee, by contract or conduct subsequent in date, deviates from or fails to conform to the first contract, thereby introducing "a risk of a very different character from that which the defendant assumed" this will "preclude a recovery thereon" (*Tradesmen's Nat. Bank* v. *Nat. Surety Co.*, 169 N. Y. 563, 567; *Page* v. *Krekey*, 137 N. Y. 307, 314).

That there was "deviation" here is unquestionable under the authorities, "In other words, a 'deviation' from the agreement" (*Smith Kirkpatrick & Co.* v. *Columbian SS Co.*, 5 Cir., 88 F. 2d 392).

This Court has held that "In making a contract, parties are as important an element as the terms with reference to the subject matter. Mutual assent as to both is alike necessary. . . . A new party could no more be imported into the contract and imposed upon the bank without its consent, than a change could be made in like manner in any other preexisting stipulation" (*National Bank* v. *Hall*, 101 U. S. 43, 50). See also *Arkansas Smelting Co.* v. *Belden Co.*, 127 U. S. 379, 387; *Boston Ice Co.* v. *Potter*, 123 Mass. 28, 30, and *Schmaling* v. *Thomlinson*, 6 Taunt. 147, 128 Eng. Reprint 989, cited in the Petition for Certiorari, p. 29.

The December 1956 contract, Purchase Order No. N. Y. 1971, was between Petitioner and Republic, and was expressly made "intransferable". Republic, therefore, could not assign it in whole or in part to libellant. But to attempt by the March 16, 1957 contract between Republic and libellant to have libellant become carrier for one cargo, though not purporting to assign to libellant an interest in the December 1956 contract of Petitioner, constituted a deviation, substituting for the making of one voyage "A new party" as definitely as would have been an attempt at prohibited assignment.

In *Goodrich* v. *Thompson*, 44 N. Y. 324, 334, the deviation was the use of a different vessel than that designated in the contract. The Court said that:

> "That would justify a control over property which was never authorized. A specific agreement to do an act in a certain manner is not satisfied by an attempt to do it in another and a failure to accomplish the object."

The use of a different company, libellant, than that designated in the contract, Republic, to even greater de-

gree was the substitution of "a control over the property which was never authorized", than would have been the use of an unauthorized vessel.

Republic, being unable under its "indivisible intransferable" contract of December 1956 to assign or transfer to libellant the safe berth clause therein, its making of the March 16, 1957 contract with libellant containing a safe berth clause of its own was a deviation which, in accord with the authorities above cited "wiped out", "vitiates and avoids", "forfeited" and precluded either Republic or libellant from claiming the benefit of *(The St. Johns N F, supra)* the safe berth clause of the December 1956 contract.

Obviously this "added so notably to the risks of the prescribed voyage that the voyage ceased to be the same" *(Calmar SS Corp. v. Scott*, 2 Cir., 197 F. 2d 795, 801) as any contracted for by Petitioner under the December 1956 contract. Libellant, under the March 26, 1957 contract with Republic, was interested only in one cargo delivery, and this at rates far less than those provided between Petitioner and Republic in their seven cargo December 1956 contract. The high profits available to tankers at the time, due to the Suez Canal closure, made a one cargo carrier such as libellant much more eager to enter, deliver and depart quickly, than a seven cargo contractor such as Republic having its highly profitable December 1956 contract with Petitioner.

Further and fatal deviation was involved by opposite treatment in the two contracts of clause "28. LIBERTY CLAUSES," by which Petitioner and Republic provided for, but Republic and libellant eliminated, the important discretion exercisable by a master. That clause provides:

> "28. LIBERTY CLAUSES. (a) In any situation whatsoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the . . . Master is likely to give rise to risk of . . . damage, delay or disadvantage to or loss of the Vessel . . . or to make it unsafe, impru-

> dent . . . for any reason . . . to enter or discharge the cargo at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge in such port, . . . the . . . Master, whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the cargo there, may discharge the cargo into depot, lazaretto, craft or other place; or the Vessel may proceed or return, directly or indirectly, to or stop at any such port or place whatsoever as the Master . . . may consider safe or advisable under the circumstances, and discharge the cargo, or any part thereof, at any such port or place; or . . . the Master may retain the cargo on board . . . until such time as . . . the Master thinks advisable and discharge the cargo at any place whatsoever as herein provided or . . . the Master may discharge and forward the cargo by any means at the risk and expense of the cargo."

It was specifically provided by a typewritten clause of the December 1956 contract, Purchase Order No. N. Y. 1971, between Petitioner and Republic, that "Clauses . . . 28 . . . of Part II of Warshipoilvoy (rev.) 11/1/45, will apply to this Purchase Order to the extent that they do not change the character of this purchase order from that a C & F purchase made by Y. P. F. as per this purchase order complementary of Purchase Order NY-1970."

By contrast, it was specifically provided by a typewritten clause of the March 16, 1957 contract between Republic and libellant that "2. It is understood and agreed that clauses 27 through 31 of Part II hereof deleted."

It was held over 160 years ago that instructions from an owner limiting the discretion of the Master constitutes a deviation (*Middlemoss* v. *Blakes*, (1797) 7 T. R. 162, 101 Eng. Reprint 911; 1 Arnould on Marine Insurance (1961 Ed.) § 443, p. 417; 5 Couch Cyclopedia of Insurance Law § 1073q). Here, by the charter party contract under which he operated the Master's discretion was eliminated.

Thereby both the meaning of the safe berth clause was affected, and the risk greatly changed and increased from that which would have existed under the December 1956 contract. This was of special importance in connection with determination by him and the pilot upon arrival of the vessel at Interseccion (The Roads) whether to lighter there, or at least to wait there until it could be definitely ascertained that the berth was available; i.e., until assured that the Esso barge had vacated the berth. Petitioner has contended that it was negligent of the Master to proceed in from Interseccion with knowledge that at last report the Esso barge was still occupying the berth; and without ascertaining whether (as was the fact) Milanowski intended and was about to proceed out to Interseccion to arrange for lightering there. Even the question of the Master's negligence must be different, however, under the March 16, 1957 agreement (with his discretion eliminated) than would that of a Master operating under the December 1956 agreement (which provided for the Master's discretion). Equally the question of Milanowski's negligence is different under the two contracts. Knowing, as he must have, of the March 16, 1957 contract which deleted the Master's discretion, Milanowski's responsibility and duty was absolute to give the Master specific instructions to wait at Interseccion until he arrived there with the officials to arrange for lighterage.

The original Petition for Certiorari herein (p. 18) emphasized the "wide recognition and use by buyers and sellers throughout the world" which has been accorded to the "Revised American Foreign Trade Definitions—1941", used in the December 1956 contract but not in the March 16, 1957 charter contract between Republic and libellant. This statement at p. 18 was in point "I" of the Petition (pp. 10-18) relating to the non-maritime nature, for jurisdictional purposes, of Petitioner's indivisible intransferable C & F contract, consisting of the two complementary purchase Orders 1970 and 1971.

But reexamination of the Petition, and particularly the contention in point "VI" thereof (Petition for Certiorari,

pp. 35-40) that "a safe berth clause is not an abstract warranty" (id., p. 35) and point "IV" (id., pp. 29-33) discloses that counsel failed therein to express adequately and with equal emphasis the "wide use" (345 U. S. 428) of the WARSHIPORLVOY (Rev.) par. 6 safe berth clause in differing mercantile and transportation contracts. And your Petitioner submits that the application should be reconsidered in light of this fact that the "wide use" (345 U. S. 428) in mercantile and transportation contracts of safe berth clauses so worded "makes their construction, a necessary issue herein, a matter of more than individual concern" (345 U. S. 428); that they must be construed in light of the differing parties, differing circumstances, and other express provisions of the differing contracts in which they are incorporated; that this the Courts below have failed to do; that determination should be made of the important questions of deviation and the effect of deviation herein; and that this, "a necessary issue here", is definitely "a matter of more than individual concern" (345 U. S. 428).

II. The fact that the March 16, 1957 charter party between Republic and libellant was made two and a half months *subsequent* to Petitioner's December 1956 agreement with Republic itself distinguishes the safe berth clause decisions relied on by respondents and the Courts below. The distinction is absolute, and the principle involved in those decisions violated, when there is taken into account the point above noted that the *subsequent* agreement here involved constitutes a deviation from the earlier one. In *Constanting & Pickering SS Co.* v. *West India SS Co.*, 199 Fed. 964; *Cities Service Transp. Co.* v. *Gulf Ref. Co.*, 79 F. 2d 521; *Park SS Co.* v. *Cities Service Oil Co.*, 188 F. 2d 804 and similar cases relied on by respondents and the Courts below, no difference in meaning and no fact or question of deviation could arise because the making of the charter party or bill of lading *preceded* the undertaking by the subcharterer or consignee, and the subcharterer or consignee by contract *thereafter* made, upon or with reference to the already existing charter or bill of lading, in effect adopted all of its provisions.

Here no attempt was made by Republic or libellant to have libellant operate under the December 1956 agreement, as Republic's agent or otherwise. Rather, libellant could and did operate only under the March 16, 1957 charter party agreement. And no attempt was made by Republic or libellant to have Petitioner adopt, approve, ratify or become a party to the March 16, 1957 charter party agreement. That they had no intention of doing so is manifest from the special provision typewritten into the charter party that "2. It is understood and agreed that clauses 27 through 31 of Part II hereof deleted." Clause 27, entitled "ASSIGNMENT", thus deleted, would have provided that, subject to the owner's approval, "the Charterer shall have the option of subletting or assigning this Charter to any individual or company, but the Charterer shall always remain responsible for the due fulfillment of this Charter in all its terms and conditions." It thus was impossible for Republic to assign or transfer to libellant any of Republic's rights or duties under the "intransferable" December 1956 contract with Petitioner, and impossible for Republic to assign or transfer to Petitioner any of Republic's rights or duties under the March 16, 1957 contract with libellant. The decision of the Courts below thus presents a most "serious question" (*Costabile* v. *National Steamship Co.*, 154 U. S. 51, 71), entirely different from the question involved in *Constantine & Pickering SS Co.* v. *West India SS Co.*, *Cities Service Transp. Co.* v. *Gulf Ref. Co.*, and *Park SS Co.* v. *Cities Service Oil Co.*, relied on by respondents and the Courts below, and which this Court should review and for this purpose should reconsider and grant your Petitioner's application for certiorari.

III. Of certain of the clauses involved in *Calmar SS Corp.* v. *Scott*, *supra*, 345 U. S. 427, 440, the Court said:

> "If they are both written for a voyage, there is an implied warranty that *no different* voyage will be undertaken. But it is a warranty which must be construed in light of the *express provisions* of the policy, and which *may mean different things in different policies*" (345 U. S. 440) (Italics ours).

Here, as of March 16, 1957, Republic, having made at least two cargo deliveries (the record does not disclose whether it was two or three) under the December 1956 agreement with Petitioner, during which it fully learned, if it did not previously appreciate, the tidal nature of the Buenos Aires harbor, and during each of which lighterage had been had at Interseccion (The Roads), and being bound for the transportation and delivery of the remainder of the seven cargoes, was bound by at least an implied warranty that this knowledge and experience would not be ignored; and, because the December 1956 contract was by its express provisions both "intransferable" and "indivisible", this was either an express warranty or at least an implied warranty that "no different" carrier and "no different" contract would be used.

The safe berth clause in the December 1956 contract with Petitioner, if a warranty, was subject as of March 16, 1957 to limitation by the knowledge theretofore acquired; having learned as of that date that due to tides and winds a vessel might not remain at any and all times safely afloat, Republic could not thereafter contend that the warranty meant that it would (Cf. *Hitchcock* v. *Hunt*, 28 Conn. 343, 349-351; *Draper* v. *Sweet*, 66 Barb. (N. Y.) 145, 147; *Bruce* v. *Fiss, Barr & Carroll Horse Co.*, 2 Dept., 47 App. Div. (N. Y.) 273; 5 Williston on Contracts (Rev. Ed.) § 1394). In *Hitchcock* v. *Hunt*, *supra*, pork was sold with a warranty that the barrels would not leak; the buyer discovered a commencement of leakage but took no measures to avoid injury to the pork; it was held that the buyer could not recover for loss of the pork due to leakage, because this was due to his own fault, saying:

> "We cannot consider it necessary to confute a position so preposterous. As well might it be claimed that a person who should buy a ship warranted seaworthy, and, after discovering its deficiency in this respect, should place his goods in it for transportation, could, on their loss from such cause, recover from the vendor their value; or that one who should buy an animal with a warranty against some danger-

> ous habit, or a carriage with a warranty that it was safely built, and, in one case should afterwards, knowing that the animal had that habit, intentionally expose himself to its exercise and receive a personal injury, or, in the other, knowing that the carriage was not safely constructed, ride in it and get hurt, could recover of the vendor on his warranty for such injury. In these and similar cases the injury is considered, and properly, as not arising directly from the defect warranted against, but rather from the want of reasonable care on the part of the purchaser, and for which he has no claim on the warranty" (28 Conn. 350-351).

In all such cases, as Judge (later Justice) Cardozo pointed out in *McClelland* v. *Climax Hosiery Mills*, 252 N. Y. 347, 359, there is not involved mere mitigation of damages, for "He has broken the chain of causation, and loss resulting to him thereafter is suffered through his own act".

The Court of Appeals thus erred in treating the present case of one of mitigation of damages, with the burden on Petitioner to prove mitigation (See opinion below, Petition for Certiorari, appendix p. 8a).

When Republic as of March 16, 1957 chose to make the safe berth clause in its one cargo charter party contract with libellant, Republic, at least, if not both Republic and libellant, did so with the knowledge of risks acquired on the prior voyages, and, consequently, without any right to rely upon the safe berth clause of the December 1956 contract as a warranty that the ship could remain always afloat.

Petitioner was not a charterer; it did not assume liabilities as a charterer; it did not participate in the command or control of the vessel. The Master could not rely and did not rely on the December 1956 contract which was unknown to him. His actions instead were under the March 16, 1957 charter party. Either as Master he was guilty of gross negligence, or what otherwise would have been gross negligence on his part was due to Republic and libellant

deleting clause 28 from the March 16, 1957 charter contract. As Milanowski, the pilot and the Master all knew, the berth was occupied by the Esso barge and, particularly in view of the labor disturbance affecting the use of tugboats, the completion of unloading of the Esso barge could not mean that the berth was available.

Unless reviewed and reversed by this Court, the decision will set a new and dangerous precedent, which must inevitably be later criticised and modified or overruled. The Court's statement at the end of its opinion that "we are confident" that no "attempt at double recovery" will be made, is a most cavalier and unauthorized manner of avoiding the disclosure that libellant failed to prove any title or right whatever to the vessel on which to base either the charter contract or its claim herein.

If, in view of the serious questions presented, the denial of the petition for certiorari was influenced by a failure to show a conflict in decisions interpreting Purchase Order contracts of your Petitioner, *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50, cited in par. 2 of Rule 58, is an authority for reconsideration. The Court said, at 305 U. S. 50:

> "Petition for certiorari . . . was at first denied, there being no conflict of decisions, 303 U. S. 639. We later granted certiorari, 304 U. S. 587, on a petition for rehearing showing that, notwithstanding the doubtful validity of the patents, litigation elsewhere with a resulting conflict of decisions was improbable because of the concentration of the automobile industry in the sixth circuit" (305 U. S. 50).

Your Petitioner, "an agency of the Argentine Government" (Court of Appeals opinion, p. 3a of appendix to Petition for Certiorari) maintains its "Commission in the United States" in New York City, in the Second Circuit, where its Purchase Order contracts covering huge purchases of oil and transportation thereof to Argentina have been made for years and continue to be made, and where

Purchase Orders Nos. N. Y. 1970 and 1971 were made. With a whole nation's (Argentina's) oil and transportation purchasing activities in this country thus concentrated in the Second Circuit, Petitioner is faced with the same circumstance that "litigation elsewhere with a resulting conflict of decisions (is) improbable" (305 U. S. 50).

Conclusion

Your Petitioner's application for rehearing should be granted and its Petition for Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We, the undersigned RALPH BOSCH and CHARLES A. ELLIS, Counsel herein, certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds specified in par. 2 of Rule 58 of the Rules of the Supreme Court of the United States.

Dated, May 10, 1963.

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CHARLES A. ELLIS, *of Counsel.*